(1)

90-1504

Supreme Court, U.S.
FILED
MAR 28 1991
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

1990 - 1991 TERM

DIANE G. WARNER,
Respondent,
Plaintiff-Appellant,
Cross-Appellee.

v.

PIERCE COUNTY DISTRICT COURT PROBATION OFFICE, ET AL.
Petitioner,
Defendants-Appellees,
Cross-Appellants.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Attorneys for Petitioners

NO. _____

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DIANE G. WARNER,
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A. QUESTIONS PRESENTED:

1) Do allegations regarding a public official's motivation strip the qualified immunity protections enunciated in Harlow v. Fitzgerald, 457 U.S. 800, 815-818, 73 L.Ed.2d 396, 408-410, 102 S.Ct. 2727 (1982), by spawning questions of fact whether lawful actions are subjectively the product of an unlawful motive to suppress or retaliate against the exercise of First Amendment rights?

2) At what threshold are First Amendment retaliation claims ripe for adjudication pursuant to 42 U.S.C. § 1983?

B. LIST OF ALL PARTIES TO THE PROCEEDING:

Petitioners: Pierce County District Court Probation Office; Elaine McNally, Director of Pierce County District Court Probation Office, in her official capacity, and as an individual, and as part of the marital community with Terry Schmid, and Pierce County, a municipal corporation and political subdivision of the State of Washington.

Respondents: Diane G. Warner

TABLE OF CONTENTS

		Page
I.	OPINIONS BELOW	.1
II.	JURISDICTION	.1-3
III.	CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3-4
IV.	STATEMENT OF THE CASE	4-6
V.	REASONS FOR GRANTING PETITION	.6-13
VI.	CONCLUSION.	13-14
VII.	APPENDIX	.15
	(i) Memorandum Opinion of Ninth Circuit	16-26
	(ii) Order of Dismissal of District Court, W.D. Wash.	27-28
	(iii) Order Denying Rehearing of Ninth Circuit. . . .	.29-30

TABLE OF AUTHORITIES

Cases

Allen v. Scribner, 812 F.2d 426 (9th Cir. 1987) 10

Anderson v. Creighton, 483 U.S. 635, 639, 97 L.Ed.2d 523, 530, 107 S.Ct. 3034, 3039 (1987) 13

Connick v. Myers, 461 U.S. 138, 75 L.Ed.2d 708, 103 S.Ct. 1684 (1983) 6,7

Davis v. Scherer, 468 U.S. 183, 191, 104 S.Ct. 3012, 3018, 82 L.Ed.2d 139, 147 (1984) 11

Egger v. Phillips, 710 F.2d 292 (7th Cir. 1983) (En Banc), cert. denied 464 U.S. 918 10

Harlow v. Fitzgerald, 457 U.S. 800, 815-818, 73 L.Ed.2d 396, 408-410, 102 S.Ct. 2727 (1982) 10,12

Mitchell v. Forsyth, 472 U.S. 511, 526-29, 86 L.Ed.2d 411, 425-27, 105 S.Ct. 2806, 2816 (1985) 2,11

Poole, et al. v. Pierce County District Court Probation Office, et al. in CA No. 89-35004, 89-35041 1

Rutan v. Republican Party of Illinois, _____ U.S. _____, 111 L.Ed.2d 52, 67 110 S.Ct. 2729 (1990) 11

Siegert v. Gilley, 895 F.2d 797, 801-802 (D.C. Cir. 1990) cert. pending . 9

Tubbesing v. Arnold, 742 F.2d 401 (8th Cir. 1984) 10

Constitutional Provisions

First Amendment. 7,8,9,11,13

Statutes

28 USC § 1254(1). 2

28 USC §1291 2

42 USC § 1983 3

I. **OPINIONS BELOW**.

Unpublished opinion of the United States Court of Appeals for the 9th Circuit in Poole, et al. v. Pierce County District Court Probation Office, et al. in CA No. 89-35004, 89-35041, filed August 9, 1990. See Appendix, page 1; 9th Circuit Order Denying Rehearing and Rehearing En Banc CA No. 89-35004/35041. See Appendix, page 28.

II. **JURISDICTION**.

The United States District Court for the Western District of Washington issued an Order of Dismissal, without prejudice on December 8, 1988. See Appendix, page 26. The Order denied Defendant's motion for summary judgment on the issue of qualified immunity. The 9th Circuit affirmed the lower court's ruling on the issue of qualified

immunity, reversed the dismissal without prejudice and on August 9, 1990, remanded for trial. Petitioner's Petition for Rehearing and Rehearing en banc was denied January 8, 1991.

United States Supreme Court jurisdiction is conferred by 28 USC § 1254(1).

This Court has noted, that qualified immunity "is an **immunity from suit** rather than a mere defense to liability . . . ." Mitchell v. Forsyth, 472 U.S. 511, 526-29, 86 L.Ed.2d 411, 425-27, 105 S.Ct. 2806, 2816 (1985). (Emphasis in original). A "district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 USC §1291 notwithstanding the absence of a

final judgment." Id.

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

A. United States Constitution Amendment One:

AMENDMENT I

FREEDOM OF RELIGION, OF SPEECH, AND OF THE PRESS. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

B. 42 USC § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered

to be a statute of the District of Columbia.

IV. **STATEMENT OF THE CASE**.

A municipal probation officer dissatisfied with her employment and her immediate supervisor, the Probation Department Director, brought suit. The plaintiff has not been fired, transferred, demoted, suspended, reprimanded, or otherwise had any reduction in her status or income, denied pay increases, job benefits or requests. Plaintiff filed her lawsuit 122 days after the conclusion of a previous successful lawsuit.

Plaintiff asserts that she received "nitpicking" criticisms on four of eight cases audited by the department director in a routine semi-annual audit, that the number of jail house interviews that she

was assigned to do had increased and that she was not warmly received by her co-workers since filing the prior lawsuit, that she was reviewed differently than her co-workers and that a file of her correspondence with defendants was set up after she filed this suit.

The plaintiff's physician alleged by deposition that plaintiff had experienced an acute stress reaction which plaintiff attributed to her working conditions. Plaintiff believes her department director is watching her closely so that adverse employment action may be taken against her at some future date in retaliation for having successfully brought a prior lawsuit. Defendants denied any intent to retaliate or that plaintiff was treated

differently from other employees.

Defendants moved for summary judgment on the grounds, inter alia, that the case was not ripe for adjudication, the plaintiffs' had failed to state a cause of action and the probation department director was entitled to qualified immunity. The District Court dismissed the plaintiff's claim without prejudice presumably on a ripeness grounds and denied sub silentio defendant's motion for qualified immunity and dismissal for failure to state a claim. Appendix, page 28.

V. **REASONS FOR GRANTING PETITION.**

Connick v. Myers, 461 U.S. 138, 75 L.Ed.2d 708, 103 S.Ct. 1684 (1983), establishes a threshold for judicial scrutiny by excluding an employee's speech on matters of purely personal

interest from actionable First Amendment claims. Pursuant to Connick if a government employee alleged wrongful termination because she had complained about her evaluation, receipt of department or meeting minutes, her assignments, co-workers being unfriendly to her, meetings starting on time when she was late, being advised of office policies allegedly implemented without her knowledge with no other disciplinary action taken, her employer establishing a litigation file containing correspondence between her and defendants after suit was filed, even if true, her conduct would not rise to the level of protected speech and the case would be dismissed. However, by alleging that all of those things were done with an unarticulated and unproven

motivation to retaliate against or chill the exercise of First Amendment rights, an employee who was not fired, transferred, demoted, suspended, reprimanded can force the same facts to trial under the 9th Circuit's view of the law. That result appears wrong. It hands disgruntled or malevolent employees a powerful weapon to disrupt and torment officials trying to run government offices.

The issue of ripeness in governmental employees' First Amendment retaliation suits involves an important question of federal law that should be settled by this Court. That question can be answered by this Court addressing the "mixed motive" qualified immunity issue submitted.

The Court should settle the split

among the circuits on when a public official must stand trial in a "mixed motive" First Amendment case. Some circuits have held that where the defendant's subjective intent is an essential component of plaintiff's claim, once defendant has moved for a pretrial judgment based upon a showing of objective reasonableness of the defendant's action, then the plaintiff, to avert dismissal short of trial, must come forward with something more than inferential or circumstantial support for his allegation of unconstitutional motive. That is, some direct evidence that the official's actions were improperly motivated must be produced if the case is to proceed to trial. Siegert v. Gilley, 895 F.2d 797, 801-802 (D.C. Cir. 1990) cert. pending.

In Tubbesing v. Arnold, 742 F.2d 401 (8th Cir. 1984), the court held that disputed factual issues concerning malice are irrelevant.

> Since whether the board members are entitled to qualified immunity depends only upon the 'objective reasonableness' of their conduct, disputed factual issues concerning malice, to which the district court referred in denying the summary judgment motion are irrelevant to the determination of qualified immunity.

Tubbesing v. Arnold, 742 F.2d 401 (8th Cir. 1984). See also Egger v. Phillips, 710 F.2d 292 (7th Cir. 1983) (En Banc), cert. denied 464 U.S. 918.

Here, the 9th Circuit has rejected this approach and in Allen v. Scribner, 812 F.2d 426 (9th Cir. 1987).

The Supreme Court described Harlow v. Fitzgerald, 457 U.S. 800. 73 L.Ed.2d

396, 102 S.Ct. 2727 (1982) as purging qualified immunity analysis of its subjective components, Mitchell v. Forsyth, 472 U.S. 511, 517, 86 L.Ed.2d 411, 419, 105 S.Ct. 208, 2811 (1985); and as rejecting any inquiry into the state of mind of the official in favor of a wholly objective standard. Davis v. Scherer, 468 U.S. 183, 191, 104 S.Ct. 3012, 3018, 82 L.Ed.2d 139, 147 (1984).

However, Justice Brennan commented in Rutan v. Republican Party of Illinois, _____ U.S. _____, 111 L.Ed.2d 52, 67, 110 S.Ct. 2729, n.8 (1990):

> Moreover, the First Amendment, as the Court below noted, already protects state employees not only from patronage dismissals but 'even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights.'

That slice of gratis dictum opens the floodgates for federal litigation running the gamut from: "My boss spoke cross to me," to "the office carpet color was chosen to annoy me." This petition addresses when those claims may be litigated.

This court rejected attempting to divine the motivation behind a governmental actor's objectively lawful actions:

> Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability by simply alleging violation of extremely abstract rights. Harlow would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy 'the balance that our cases strike between the interest in vindication of citizens' constitutional rights and in public officials' effective

> performance of their duties, by making it impossible for officials reasonably [to] anticipate when their conduct may give rise to liability for damages.'

Anderson v. Creighton, 483 U.S. 635, 639, 97 L.Ed.2d 523, 530, 107 S.Ct. 3034, 3039 (1987).

The 9th Circuit focused upon the alleged injuries suffered by plaintiff in evaluating this qualified immunity claim, as opposed to, analyzing the objective acts of the defendant. That inquiry circumvents the analysis required for both qualified immunity and ripeness.

VI. **CONCLUSION**.

Grant Certiorari to articulate qualified immunity standards in "mixed motive" First Amendment cases and when the public employee's "unbirthday" creates a justiciable controversy.

Respectfully submitted this 20th day of March, 1991.

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APPENDIX

(i) Memorandum Opinion of Ninth Circuit, Pages 15-25

(ii) Order of Dismissal of District Court for Western District of Washington, pages 26-27.

(iii) Order Denying Rehearing Filed January 8, 1991, pages 28-29.

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRENDA J. POOLE; DIANE G. WARNER,	)	CA NO. 89-35004, 89-35041
Plaintiffs-Appellants/ Cross-Appellees,	)	DC NO. 87-301-T
vs.	)	
	)	MEMORANDUM[1]*
PIERCE COUNTY DISTRICT COURT PROBATION OFFICE; ELAINE M. McNALLY; PIERCE COUNTY, WASHINGTON; PIERCE COUNTY PROSECUTOR'S OFFICE,	)	
Defendants-Appellees/ Cross-Appellants.	)	

Appeal from the United States District Court for the Western District of Washington - Jack E. Tanner, District Judge, Presiding
Argued and Submitted December 8, 1989 - Seattle, Washington

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

BEFORE: CANBY, WIGGINS AND FERNANDEZ, CIRCUIT JUDGES.

Plaintiff Diane Warner, a county probation officer, appeals from the district court's dismissal, without prejudice, of her § 1983 suit against the probation department and Elaine McNally, her immediate supervisor. The defendants cross-appeal from the denial of their motion for summary judgment. We reverse the district court's dismissal of Warner's suit, and affirm its denial of the defendants' summary judgment motion.

A. Dismissal without prejudice: ripeness

The district court gave no reason for its decision to dismiss Warner's complaint; it appears, however, that ripeness was the court's primary

concern.[2] Having reviewed the issue de novo, see Herrington v. County of Sonoma, 857 F.2d 567, 568 (9th Cir.), cert. denied, 109 S.Ct. 1559 (1989), we conclude that Warner's action was ripe for adjudication.

The defendants argue that Warner's claims are not ripe because she has not yet suffered any injury and asserts only speculative fears about what might happen in the future. Warner, however, has alleged specific injuries that have occurred already. She claims that she has been harassed, intimidated and

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[2] The defendants' papers in support of its motion to reconsider, which were filed at the invitation of the district judge after he made his thinking known at the pretrial conference, focused on the ripeness issue. Further, both the earlier summary judgment motions and the defendants' brief on appeal, emphasize the ripeness point.

treated unfairly since filing an earlier suit for infringement of her first amendment right to freedom of expression. ("Case I"). More specifically, she contends that McNally and the department have assigned her to do interviews at distant locations, scrutinized her attendance at classes and her contact with clerical staff (while not doing so for other employees), denied her information necessary to do her assigned work, and encouraged other employees to adopt a hostile attitude toward her. Moreover, she has offered evidence of injury in the form of deposition testimony by her physician that she suffers from an "acute anxiety type illness" as a result of her employment situation.

In light of these allegations, it

is difficult to find much merit in the defendants' position. Their reliance upon Andrade v. Lauer, 729 F.2d 1475 (D.C. Cir. 1984), is misplaced. In Andrade, the alleged injury was loss of employment, and the court upheld dismissal because the plaintiffs had not been discharged, and loss of employment was merely hypothetical at that point. See, 729 F.2d at 1481. Warner's alleged injuries, of course, are not hypothetical.

The defendants also appear to urge that Warner's claims are not ripe because she did not avail herself of the department's administrative grievance procedure. There was, however, no requirement that Warner seek administrative redress before bringing a § 1983 action. See Clark v. Yosemite

Community College District, 785 F.2d 781, 790-91 (9th Cir. 1986) (plaintiff need not first resort to state remedies before filing § 1983 action for infringement of first amendment right of association).

Finally, there is some indication that the district Court may have considered Warner's claims not ripe because they depend upon the ultimate resolution of Case I, which at present is on appeal to this Court. This position depends upon an erroneous conception of Warner's action. Warner asserts in this case that McNally and the department subjected her to harassment and other unfair treatment because she sought to vindicate her first amendment rights in Case I. This court has held recently that such a

claim of retaliation is well within the scope of § 1983. Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314-15 (9th Cir. 1989) ("Deliberate retaliation by state actors against an individual's exercise of [the right of access to the courts] is actionable under section 1983.") Thus, Warner's allegations in this case establish a basis for § 1983 relief that is independent from that of Case I. The ultimate outcome of her first amendment claim in Case I is irrelevant to the basis of her claim in this case.

B. Denial of defendants' summary judgment motion

The defendants argue that the district court should have granted their summary judgment motions and dismissed Warner's claims with prejudice. Having

reviewed this issue de novo. see Kruso v. International Telephone & Telegraph Corp., 872 F.2d 1416, 1421 (9th Cir.), cert. denied, 58 U.S.L.W. 3801 (U.S. June 18, 1990), we conclude that the district court properly denied summary judgment.

The defendants contend first that Warner's claim against the department fails as a matter of law because Warner has not demonstrated any official custom or policy that violated her constitutional rights. They allude to an ordinance that places policy-making authority over hiring and firing in a three-member committee (which includes McNally). Contrary to what this reference implies about Warner's allegations, she claims that she suffered retaliation due to the way in

which McNally operated the department, rather than in the hiring and firing decisions themselves. Considering the fact that McNally was the Director of Probation, it is reasonable to assume that she has policy making authority when it came to the daily operations of the Probation Office. Because defendants have not shown that she lacked that authority, summary judgment would have been inappropriate.

The defendants also argue that the district court should have dismissed Warner's claims against McNally because McNally is entitled to qualified immunity. The defendants acknowledge that qualified immunity would not protect McNally from liability for violating a "clearly established" constitutional right. See e.g.,

Mitchell v. Forsyth, 472 U.S. 511, 528 (1985). They urge, however, that Warner claims infringement of a right to express "dissatisfaction with the way [her] department is run," and that this is not a clearly established right. See Appellee's Brief #1 at 25-26.

This argument misconceives Warner's claim. Her suit alleges that McNally subjected her to harassment in retaliation for seeking to vindicate her right to free speech via Case I. The right to resort to the courts without retaliation is a long-standing principle, derived from the first amendment. See, e.g., Soranno's Gasco, Inc., 874 F.2d at 1314 ("The right of access to the courts is subsumed under the first amendment right to petition the government for redress of

grievances." (citing cases)).

Furthermore, we have recognized for some time that the government violates the first amendment rights of its employees by retaliating against them for exercising those rights, even if the retaliation is short of discharge. See Rutan v. Republican Party of Illinois, 58 U.S.L.W. 4872, 4875 & n.8 (U.S. June 21, 1990); Allen v. Scribner, 812 F.2d 426, 434 (9th Cir. 1987).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Defendants-Appellees/Cross-Appellants to pay costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DIANE G. WARNER, Plaintiff, vs. PIERCE COUNTY DISTRICT COURT PROBATION OFFICE, et al.,	)	NO. C87-301T ORDER

THIS MATTER comes on before the above-entitled Court upon Defendants' Motion for Reconsideration.

Having considered the entirety of the records and file herein and in accordance with pretrial conference discussions with counsel and a reconsideration of Defendants' Summary Judgment Motion, it is hereby

ORDERED that Plaintiff Warner's claims against Defendants McNally and the Pierce County District Court

Probation Office are DISMISSED without prejudice.

The clerk of the court is instructed to send uncertified copies of this Order to all counsel of record.

DATED this 8th day of December, 1988.

/S/ JACK E. TANNER
UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRENDA J. POOLE; DIANE G. WARNER,	)	CA NO. 89-35004, 89-35041
Plaintiffs-Appellants/ Cross-Appellees,	)	DC NO. 87-301-T
vs.	)	
	)	ORDER
PIERCE COUNTY DISTRICT COURT PROBATION OFFICE; ELAINE M. McNALLY; PIERCE COUNTY, WASHINGTON; PIERCE COUNTY PROSECUTOR'S OFFICE,	)	
Defendants-Appellees/ Cross-Appellants.	)	

BEFORE: CANBY, WIGGINS AND FERNANDEZ, CIRCUIT JUDGES.

The panel has voted unanimously to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a

vote to rehear the matter en banc.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

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In The

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October Term, 1990

DIANE G. WARNER,

Respondent,
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Cross-Appellee,

v.

PIERCE COUNTY DISTRICT COURT PROBATION OFFICE, ET AL.,

Petitioner,
Defendants-Appellees,
Cross-Appellants.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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A. QUESTIONS PRESENTED:

1) Whether the Ninth Circuit correctly determined that plaintiff/respondent Diane G. Warner had a "clearly established" right guaranteed by the First Amendment to the United States Constitution not to be subject to on the job harassment for exercising her rights to have access to the Court's when such harassment commences a scant few months after respondent had emerged victorious in a suit against her employer vindicating her rights to speak out on issues of "public concern" protected by the First Amendment to the United States Constitution?

2) Whether the Ninth Circuit's use of an objective standard that focuses on the state of the law in question at the time of the alleged events, as opposed to the subjective component of a particular cause of action is consistent with the mandates of Supreme Court precedent?

B. LIST OF ALL PARTIES TO THE PROCEEDING:

Petitioners: Pierce County District Court Probation Office; Elaine McNally, Director of Pierce County District Court Probation Office, in her official capacity, and as part of the marital community with Terry Schmid, and Pierce County, a municipal corporation and political subdivision of the State of Washington.

Respondents: Diane G. Warner.

TABLE OF CONTENTS

Page

OPINION BELOW 2

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING PETITIONER'S REQUEST FOR WRIT 5

1. The Ninth Circuit Correctly Determined That It Was Clearly Established Law, For The Purposes of Denying Petitioner McNally Qualified Immunity, That A Public Employee Could Not Be Subject To Retaliatory Harassment For Exercising Her Constitutional Rights To Have Access To The Courts 5

CONCLUSION 14

TABLE OF AUTHORITIES

Pages

CASES

A.P.W.U. v. U.S. Postal Services, 830 F.2d 294, 311 (D.C. Cir. 1987) 13

Allen v. Scribner, 812 F.2d 426, 434 (9th Cir. 1987) ...7, 9

Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) 8

Anderson v. Central Point School Dist. No. 6, 746 F.2d 505 (9th Cir. 1984) 9

Bart v. Tilford, 677 F.2d 622, 625-26 (7th Cir. 1982) 9

Bickel v. Burkhart, 632 F.2d 1251 (5th Cir. 1980) 10

Brule v. Southworth, 611 F.2d 406 (1st Cir. 1979) 10

Burgess v. Pierce County, 918 F.2d 104, 106 n.3, 107 (9th Cir. 1990) 2, 12

Clark v. Yosemite Community College Dist., 785 F.2d 781 (9th Cir. 1986) 10

Elliott et al. v. Pierce County District Court Probation Office et al. Western District of Washington Cause No. C85-1316T 3, 4

Gillette v. Delmore, 886 F.2d 1194, 1197 (9th Cir. 1989) 11

Gutierrez v. Mun. Ct. of S.E. Judicial Dist., 838 F.2d 1031, 1048 (9th Cir. 1988) 8

Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982) 7

Harrison v. Springdale Water and Sewer Comm., 780 F.2d 1422, 1427-28 (8th Cir. 1986) 11

TABLE OF AUTHORITIES – Continued

Pages

Hobson v. Wilson, 737 F.2d 125 (D.C. Cir. 1984) 7

Little v. Walker, 552 F.2d 193, 197 (1977) 8

Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) 11

Manhattan Beach Police Officers Ass'n, Inc. v. City of Manhattan Beach, 881 F.2d 816, 819 (9th Cir. 1989) 12

Matzker v. Herr, 748 F.2d 1142, 1150-51 (7th Cir. 1984) 12

Mays v. Williamson and Sons Janitorial Services, Inc., 775 F.2d 258, 259 (8th Cir. 1985) 13

McDonald Douglas v. Green, 411 U.S. 792, 802-05, 93 S.Ct. 1817, 36 L.Ed.2d (1973) 13

Missouri Education Ass'n v. New Madrid County R-1 School Dist., 810 F.2d 1164-67 (8th Cir. 1987) 13

Mitchell v. Forsyth, 472 U.S. 511, 526-29, 105 S. Ct. 2806, 2816, 86 L.Ed.2d 411, 425-27 (1985) 2, 8

Morales v. Cadena, 825 F.2d 1095 (7th Cir. 1987) 10

Ostlund v. Bobb, 825 F.2d 1371, 1374 (9th Cir. 1987) ...7, 8

Rankin v. McPherson, 483 U.S. 378, 107 S. Ct. 2891, 2896, 97 L.Ed.2d 315 (1987) 9

Reeves v. Clairborne Cty. Bd. of Ed., 828 F.2d 1096 (5th Cir. 1987) 10

Rutan v. Republican Party of Illinois, ___ U.S. ___, 110 S. Ct. 2729, 111 L.Ed.2d 52 (1990) 9

Rutan v. Republican Party of Illinois, 58 U.S.L.W. 4872, 4875 & n.8 (U.S. June 21, 1990) 6

TABLE OF AUTHORITIES – Continued

Pages

Schwartzman v. Valenzuela, 846 F.2d 1209 (9th Cir. 1988) 11, 13

Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314-15 (9th Cir. 1989) 6, 12

Thomas v. Harris County, 784 F.2d 648 (5th Cir. 1986) 10

Tribble v. Gardner, 860 F.2d 321, 324 (9th Cir. 1988) 8

U.S. Postal Service Bd. of Gov. v. Aikens, 460 U.S. 711, 716-17 (1982) 13

Ward v. County of San Diego, 791 F.2d 1329, 1332 (9th Cir. 1986) 7

Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989) 8, 11

STATUTES

42 USC § 1983 2

No. 90-1504

In The

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October Term, 1990

DIANE G. WARNER,

Respondent,
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Cross-Appellee,

v.

PIERCE COUNTY DISTRICT COURT
PROBATION OFFICE, ET AL.,

Petitioner,
Defendants-Appellees,
Cross-Appellants.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

Respondent, Diane G. Warner, respectfully prays that for the reasons discussed below, that a writ of certiorari *not issue* to review the judgment of the United States Court of Appeals for the Ninth Circuit and that said decision remain unaltered and allowed to stand.

OPINION BELOW

Respondent agrees and adopts Petitioner's description of the unpublished decisions of the Court of Appeals for the Ninth Circuit and for the sake of brevity further incorporates Petitioner's appendices as if fully attached hereto.

STATEMENT OF JURISDICTION

Respondent concurs in Petitioner's statement of jurisdiction and the description of parties set forth at page ii of Petitioner's petition for writ of certiorari. Petitioner further concurs that the denial of the affirmative defense is a collateral order subject to immediate appellate review under this Court's opinion in *Mitchell v. Forsyth*, 472 U.S. 511, 526-29, 105 S. Ct. 2806, 2816, 86 L.Ed.2d 411, 425-27 (1985). Respondent further notes that although the question subject to appellate review has been characterized as a "legal questions" the circuit courts have in such appeals not only reviewed the "conceptually divisible" question of qualified immunity but also the merits of the underlying factual propriety of the denial of summary judgment. See *Burgess v. Pierce County*, 918 F.2d 104, 106 n.3 (9th Cir. 1990) and the cases cited therein.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent agrees that this case involves the First Amendment to the Federal Constitution and that this case was brought pursuant to 42 USC § 1983.

STATEMENT OF THE CASE

In December of 1986, Diane Warner was one of five plaintiffs who received an award totalling $460,436.00, by way of a jury verdict in the case of *Elliott et al. v. Pierce County District Court Probation Office et al.*, Western District of Washington Cause No. C85-1316T. The *Elliott* case involved a claim that the plaintiffs therein First Amendment rights had been violated by various adverse employment decisions taken against them by supervisory officials of the Probation Office for efforts to engage on speech on "matters of public concern". Following the verdict, respondent Diane G. Warner was the only remaining plaintiff still employed by the Probation Office. Warner's share of the total verdict was $55,500.00 against the defendants, which included her supervisor, Elaine McNally. Following the litigation McNally and Warner had only minimal direct contact due to the fact that Warner was and is stationed at a separate satellite probation office located several miles from the main probation office.

McNally's first real effort to have contact with Warner, other than routine staff meetings, was when she audited some of Warner's case files. This audit purportedly was part of a routine and random audit of all staff probation officers files.

In the audit Warner was severely downgraded, for among other things, failing to apply policies that were not in effect until after the audited files were closed and selected for audit. McNally also falsely accused Warner of filing a false report to a court.

On April 16, 1987 respondent filed a complaint with the Federal District Court for the Western District of Washington alleging that she was being subject to retaliation and intimidation in violation of her First Amendment rights.

In response to the filing of the complaint in the instant case, McNally wrote a threatening memo to Warner demanding information related to the allegations in the lawsuit and threatening Warner with disciplinary action if she failed to respond. As indicated by the Ninth Circuit opinion discovery revealed and as time progressed:

> . . . McNally and the department have assigned [Warner] to do interviews at distant locations, scrutinized [Warner's] attendance at classes and her contact with clerical staff (while not doing so for other employees), denied [Warner] information necessary to do her work, and encouraged other employees to adopt a hostile attitude toward her. Moreover [Warner] has offered evidence of injury in the form of deposition testimony by her physician that she suffers from an 'acute anxiety type illness' as a result of her employment situation. (Petitioner's brief, page 19.)

After denying three motions for summary judgment, the District Court, *sua sponte* invited reconsideration of the case apparently due to its concerns that because the *Elliott* case was on appeal, the instant case was not "ripe" for adjudication. The defense in response thereto renewed their previous motions for summary judgment and included the additional grounds of "ripeness". The district court granted this motion and dismissed Warner's case *without prejudice*. An appeal to the Ninth Circuit

Court of Appeals followed. As indicated the Ninth Circuit reversed and remanded for trial.

REASONS FOR DENYING PETITIONER'S REQUEST FOR WRIT

1. The Ninth Circuit Correctly Determined That It Was Clearly Established Law, For The Purposes of Denying Petitioner McNally Qualified Immunity, That A Public Employee Could Not Be Subject To Retaliatory Harassment For Exercising Her Constitutional Rights To Have Access To The Courts.[1]

Petitioner's arguments in favor of granting certiorari in most instances are stated in such a confusing manner that it is difficult to formulate a reasoned response without having to make assumptions as to what is being argued and formulating a response based on such assumptions. It is assumed that petitioners are arguing that under a proper qualified immunity analysis, McNally should have been immunized from liability for allegedly violating Warner's rights to have access to the courts because the Ninth Circuit was in error for " . . . focus[ing] upon the alleged injuries suffered by plaintiff by evaluating this qualified immunity claim, as opposed to, analyzing the objective acts of the defendant.". It is suggested that if such is the essence of the

[1] The municipal entity defendant "Pierce County District Court Probation Office" is not entitled to "good faith" immunity, thus even if McNally were to be afforded immunity, that would not necessarily end this lawsuit. *Owen v. City of Independence*, 445 U.S. 622, 638, 100 S. Ct. 1398, 1409, 63 L.Ed.2d 673 (1980).

petitioners argument it is based on faulty analysis and a gross mischaracterization of the Ninth Circuit's decision in this case.

Procedurally, the Ninth Circuit's decision was a result of an appeal by respondent of the dismissal of her case on "ripeness" grounds and petitioner's cross-appeal on the denial of qualified immunity. Petitioners, in order to support their immunity argument, are confusing those portions of the Ninth Circuit's opinion relating to reversing the "ripeness" decision and it's de novo review of the summary judgment decision with it's holding relating to it's affirmances of the denial of qualified immunity. In reaching such an affirmance decision it is simply inaccurate to suggest that the Ninth Circuit was focusing on the nature of the injuries as opposed to nature of the rights allegedly violated and the manner in which such violation occurred. The circuit court with regard to immunity held in response to similar mischaracterizations:

> This argument misconstrues Warner's claim. Her suit alleges that McNally subjected her to harassment in retaliation for seeking to vindicate her right to free speech via Case I. *The right to resort to the courts without retaliation is a long standing principle derived from the First Amendment. See, e.g. Sorranno's Gasco, Inc.*, 874 F.2d at 1314 ("The right of access to the courts is subsumed under the First Amendment right to petition the government for redress of grievances." (citing cases)). Furthermore, we have recognized for some time that the government violates the First Amendment rights of its employees by retaliating against them for exercising those rights, even if the retaliation is short of discharge. See *Rutan v. Republican Party of Illinois,*

58 U.S.L.W. 4872, 4875 & n.8 (U.S. June 21, 1990); *Allen v. Scribner*, 812 F.2d 426, 434 (9th Cir. 1987).

It is suggested that although the Ninth Circuit's analysis is brief, based on the "objective reasonableness" standard adopted by this Court, the circuit court's decision was clearly correct. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). In the *Harlow* decision, the Court did not define how to determine when law is "clearly established". In the absence of such guidance, the Ninth Circuit developed its own test. See e.g. *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986); *Ostlund v. Bobb*, 825 F.2d 1371, 1374 (9th Cir. 1987). The Ninth Circuit's standard provides:

> . . . that in the absence of binding precedent, a court should look to all available decisional law, including decisions of state courts, other circuits and district courts to determine whether the right was clearly established. An additional factor is the likelihood that the Supreme Court or the Ninth Circuit would have reached the same result as courts that had already considered the issue.

Ward v. County of San Diego, 791 F.2d at 1332. See *Harlow v. Fitzgerald*, 457 U.S. at 818 n.32 (suggesting that the "state of the law" can be evaluated by examining all levels of federal court opinions).

Once it is established that the law is "clearly established", a government official is presumed to know about it. *Hobson v. Wilson*, 737 F.2d 125 (D.C. Cir. 1984). Previously, the Ninth Circuit has held that government officials are charged with the knowledge of constitutional

and statutory developments including all available decisional law. *Gutierrez v. Mun. Ct. of S.E. Judicial Dist.*, 838 F.2d 1031, 1048 (9th Cir. 1988); *Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988). Thus an officials' actual ignorance of "clearly established law" is no excuse and is not a basis for immunity.

However, this is not to say that liability can be predicated on violations of highly theoretical or abstract violations of constitutional rights. See *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). As noted in *Anderson:*

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official's action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent. (Citations omitted).

In other words, *Anderson* recognized that the absence of case law "directly on point" does not immunize an official from liability if the basic principles of the law are "well established". See *Ostlund v. Bobb*, 825 F.2d 1371, 1374 (9th Cir. 1987); see generally *Little v. Walker*, 552 F.2d 193, 197 (1977). (However, having a case "directly on point" does go a long way in proving the law was "clearly established". See *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989)).

Finally, it can be noted that despite petitioner's efforts to argue their version of the facts, when examining the divisible "purely legal" question of qualified immunity, the plaintiff's version of the events controls. *Mitchell*

v. Forsythe, 427 U.S. 511, 105 S.Ct. 2806, 2816, n.9, 86 L.Ed.2d 411, 426 (1985).

It is suggested that on examination of the "legal landscape" in 1987 and 1988 when the alleged events occurred, it was "clearly established law" that a public employee *could not* be subject to retaliatory adverse employment decisions short of discharge for exercising rights protected by the First Amendment. In *Rankin v. McPherson*, 483 U.S. 378, 107 S. Ct. 2891, 2896, 97 L.Ed.2d 315 (1987) this court unequivocally declared:

> It is clearly established that a State may not discharge an employee on a basis that infringes that employees' constitutionally protected interest in freedom of speech. (Citation omitted).

Recently in *Rutan v. Republican Party of Illinois*, ___ U.S. ___, 110 S. Ct. 2729, 111 L.Ed.2d 52 (1990) this Court, at least with regard to "patronage" dismissals made it clear that adverse employment decisions short of discharge which are violative of the First Amendment are actionable. It is suggested that in the context of general public employer First Amendment doctrine, *Rutan* did not break any new grounds. Indeed, in many cases predating *Rutan* and the events in this case, the lower federal courts had recognized that decisions other than discharge could violate the First Amendment if done for a retaliatory motive. See e.g. *Bart v. Telford*, 677 F.2d 622, 625-26 (7th Cir. 1982); (harassment); *Allen v. Scribner*, 812 F.2d 426 (9th Cir. 1987) (same)[2], *Anderson v. Central Point School*

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[2] While Petitioners are critical of the *Allen* case, it is believed that they misunderstand its holding. *Allen* at 436

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Dist. No. 6, 746 F.2d 505 (9th Cir. 1984) (reprimand); *Clark v. Yosemite Community College Dist.*, 785 F.2d 781 (9th Cir. 1986) (reduction in duties and schedule change); *Reeves v. Clairborne Cty. Bd. of Ed.*, 828 F.2d 1096 (5th Cir. 1987) (transfer); *Thomas v. Harris County*, 784 F.2d 648 (5th Cir. 1986) (transfer, no loss in pay); *Morales v. Cadena*, 825 F.2d 1095 (7th Cir. 1987) (failure to hire); *Brule v. Southworth*, 611 F.2d 406 (1st Cir. 1979) (placement on leave with pay); *Bickel v. Burkhart*, 632 F.2d 1251 (5th Cir. 1980) (failure to promote).

It is suggested that the Ninth Circuit did not err in determining that it was "clearly established law" that adverse employment decisions are actionable if done in retaliation for the exercise of First Amendment rights. It is further suggested that petitioners undignified, hyperbolic and cynical characterizations of respondent claim are indicative of the reasons why respondent, who has already had to seek the protection of the federal courts to vindicate her rights, had little alternative but to file a second lawsuit.

Petitioners' argument reduced to its essence is asking the Court to sanction on the job harassment of an employee because the employee filed a lawsuit, won, and had the conviction to return to the losing employer. It is

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simply held that it was for the jury to determine whether in fact "clearly established" rights had been violated. Obviously, once it is established that rights are "clearly established" the question of whether or not such "clearly established" rights were violated simply collapses into the merits of the claim.

suggested that such conduct by supervisory public officials defy "common sense". See *Wood v. Ostrander*, supra. They are also the acts of a "plainly competent" public official which do not warrant immunization. See *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). It is suggested that if any public officials should have known to respect an employee's First Amendment rights, it would be those that had just received a $460,436.00 judgment against them.[3]

Petitioners' contention that the manner in which the retaliation occurred somehow translates into the threshold question of whether a First Amendment plaintiff's expression is subject to protection makes little sense.

As discussed above, acts less than discharge have been recognized to be actionable if protected conduct is "a motivating" factor behind the adverse actions. See generally *Gillette v. Delmore*, 886 F.2d 1194, 1197 (9th Cir. 1989). Whether adverse action has occurred and whether conduct is protected are separate issues.

In the instant case, it cannot be disputed respondent engaged in protected conduct by exercising her rights to have access to the courts. As succinctly noted by the 8th Circuit in *Harrison v. Springdale Water and Sewer Comm.*, 780 F.2d 1422, 1427-28 (8th Cir. 1986):

> The United States Supreme Court has stated that '[t]he right of access to the courts is indeed but one of the right of petition'. The Court has noted

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[3] As noted by the Ninth Circuit in *Schwartzman v. Valenzuela*, 846 F.2d 1209, (9th Cir. 1988) it appears no matter how "clearly established" the law may be public officials must believe that it is mandatory for them to file *Mitchell* appeals.

> that the right to petition is among the most precious of the liberties safeguarded by the Bill of Rights; and that it has 'a sanctity and a sanction not permitting dubious intrusions'. As an aspect of the First Amendment right to petition, the right of access to the courts share this 'preferred place' in our hierarchy of constitutional freedoms and values. *It has been noted in this Circuit that 'access to the courts is a fundamental right of every citizen. An individual's constitutional right of access to the courts cannot be impaired, either directly . . . or indirectly, by threatening or harassing an [individual] in retaliation for filing lawsuits. It is not necessary that the [individual] succumb entirely or even partially to the threat as long as the threat or retaliatory act was intended to limit the [individual] right of access'. The cases from this Circuit, as well as from others, make it clear that state officials may not take retaliatory actions against an individual, designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future . . . Matzker v. Herr*, 748 F.2d 1142, 1150-51 (7th Cir. 1984) (*'An act taken in retaliation for the exercise of a constitutionally protected right is actionable under Section 1983 even if the act, when taken for a different reason, would have been proper'*) . . . (Emphasis added; Citations omitted).

The Ninth Circuit recognized and adopted these principles in *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314-15 (9th Cir. 1989) and applied them in the instant case. It is suggested that it was not error to conclude respondent had engaged in protected conduct and that it was for a jury to determine motivations. See *Burgess v. Pierce County*, 918 F.2d at 107, *Manhattan Beach Police Officers Ass'n, Inc. v. City of Manhattan Beach*, 881 F.2d 816, 819 (9th Cir. 1989).

It is suggested that Petitioners' notion that years and volumes of wrongful discharge doctrine should be disposed of and that "direct evidence" of unlawful motive be required is absurd. It has long been recognized that a victim of a wrongful discharge will seldom have direct evidence of unlawful motive and that such a victim may rely entirely on circumstantial evidence to prove his or her case. See *U.S. Postal Service Bd. of Gov. v. Aikens*, 460 U.S. 711, 716-17 (1982). Such unlawful motives "are seldom admitted". *Missouri Education Ass'n v. New Madrid County R-1 School Dist.*, 810 F.2d 1164-67 (8th Cir. 1987); *A.P.W.U. v. U.S. Postal Services*, 830 F.2d 294, 311 (D.C. Cir. 1987).

Taking Petitioners' position would require Courts to reject such recognized indicia of unlawful motive, as protected conduct closely followed by adverse employment decisions, or disparate discipline or applications of work rules or disparate scrutiny. See e.g. *Schwartzman v. Valenzuela*, supra; *McDonald Douglas v. Green*, 411 U.S. 792, 802-05, 93 S.Ct. 1817, 36 L.Ed.2d (1973); *Mays v. Williamson and Sons Janitorial Services, Inc.*, 775 F.2d 258, 259 (8th Cir. 1985).

If such circumstantial evidence vehicles were not available, a victim of even the most egregiously unlawful employment decision would be remediless unless he or she was fortunate enough to be the victim of an extremely stupid employer who by spoken or written words actually admitted to misconduct. It is suggested that there is simply no political, social, economic or legal reason to drastically undermine a victims ability to have their day in court.

CONCLUSION

A writ of certiorari should not be granted in this case. The Ninth Circuits unpublished opinion correctly applied the law and none of the grounds set forth in Supreme Court Rule 10 are present in this case. Petitioners, based on the facts alleged, violated respondents "clearly established rights" to have access to the courts and should not be afforded immunity.

DATED this 29th day of April, 1991.

Respectfully submitted,

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